A

CHONG CHIENG JEN

v.

MOHD IRWAN HAFIZ MD RADZI & ANOR

B

HIGH COURT SABAH & SARAWAK, KUCHING
RODZARIAH BUJANG JC
[CRIMINAL APPLICATION NO: 44-01-2009-I]
20 MARCH 2009

C ***CRIMINAL PROCEDURE:*** *Search warrant - Issuance of - Setting aside - Application for - Criminal Procedure Code, s. 56 - Whether there was non-compliance of - Whether infringed - Whether search warrants unlawfully issued and should be set aside*

D The applicant by this motion sought to set aside the two search warrants made by the learned Magistrate on the ground that they were issued contrary to law due to non-compliance with s. 56 of the Criminal Procedure Code. Briefly, the facts were that the applicant was an elected Member of Parliament for Bandar Kuching. His victory for the seat had been challenged by one Kho E Whai Phiaw in an election petition. It was alleged that the applicant had published in his blog *chiengjen.blogspot.com*, an article seditious in nature and aimed to cause racial disharmony among voters and canvassed votes for him. This complaint was made by one Jublin ak Derai who was called as a witness at the trial of F the election petition. The Election Judge dismissed the petition. Kho Whai Phiaw appealed to the Federal Court but the Federal Court dismissed the appeal. Prior to the decision of the Federal Court but after the Election Judge had given his verdict, the first G respondent made an application before the learned magistrate for search warrants under s. 56 of the Criminal Procedure Code to search the premises of the applicant's legal firm and residential home on grounds of suspicion of keeping incriminating materials under s. 4(c) of the Sedition Act 1948. The basis of that H suspicion was the complaint by the selfsame Jublin Ak Derai and the selfsame article which was the subject of query by the Election Judge. An additional ground was also stated to the learned Magistrate and that was that the police was instructed by the Attorney General to seize all computers and laptop belonging to I the applicant. The learned magistrate acceded to the request as a result of which the applicant's laptop was seized. Hence, this motion.

Held:

(1) At the hearing of the application for the warrants, no police report of the complainant was exhibited to the application and neither was the impugned article or the instruction from the Attorney-General's office. What must be laid before the learned magistrate must not be just any information but one credible enough to form a basis for believing that seditious materials were to be found in the two places named in the warrant and in the context of this case. Without the article, the magistrate would not be in the position to assess for himself whether the said article contained seditious tendencies which pointed to a criminal offence. Instead what he was told was merely the belief of Jublin ak Derai that the article had criminal elements and which caused disharmony amongst those of different races and religions. This snippet of opinion was clearly not enough to constitute 'information' or 'reason to believe' under s. 56 of the Criminal Procedure Code. The search warrants were unlawfully issued and must be set aside. (paras 12, 13 & 16)

(2) Section 56 of the Criminal Procedure Code provides that after seizure, the item seized must be brought before the same magistrate or some other magistrate to be dealt with in accordance with the law. In this case, the first respondent had brought the laptop back to the court and handed it over to the Registrar of the Subordinate Courts, who, after receiving instruction *via* the telephone from a magistrate, had handed over the laptop the first respondent. What the Registrar of the Subordinate Courts did was not dealing with it 'in accordance with the law.' The provision of s. 56 had been infringed yet again. Hence, the laptop of the applicant accordingly must be returned to him. (para 19)

[Order accordingly.]

Case(s) referred to:
Ahmad Ishak v. PP [1974] 1 LNS 2 HC ***(refd)***
DP Vijandran v. Karpal Singh & Ors [2000] 6 CLJ 433 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 56
Federal Constitution, art. 13(1)
Sedition Act 1948, s. 4(c)

For the applicant - Alvin Yong (Chong Siew Chiang, Voon Lee Shan, Tan Kee Heng, Wong King Wei & Yung Ing Ing with him); M/s Chong Brothers Advocates
For the respondent - Fadzillah Begum SFC

Reported by Suhainah Wahiduddin

JUDGMENT

Rodzariah Bujang JC:

[1] The applicant, a lawyer practising in the legal firm of Messrs Chong Brothers Advocates Kuching is an elected Member of Parliament for Bandar Kuching. His victory for the seat was subsequently challenged by one Kho Whai Phiaw in an election petition and one of the grounds of that petition was an allegation that the applicant had published in his blog chiengjen.blogspot.com, an article seditious in nature, aimed to cause racial disharmony among voters and to canvass votes for him. This complaint was made by one Jublin ak Derai who was called as a witness at the trial of the election petition. The election judge dismissed the petition and dealt with the publication of that article in his judgment. His Lordship found, *inter alia*, no nexus between the applicant and the writer of that article or that the article had garnered votes for the applicant. Kho Whai Phiaw appealed to the Federal Court against the decision of the election judge but the Federal Court on 6 March 2009 dismissed the appeal.

Application For Search Warrants

[2] Prior to the decision of the Federal Court but after the election judge had given his verdict, the 1st respondent, Inspector Mohd. Irwan Hafiz made an application before the learned magistrate for search warrants under s. 56 of the Criminal Procedure Code to search the premises of Messrs Chong Brothers Advocates and the residential home of the applicant on grounds of suspicion of keeping incriminating materials under s. 4(c) of the Sedition Act 1948. The basis of that suspicion was the complaint by the selfsame Mr. Jublin ak Derai and the selfsame article which was the subject of query by the election judge. An additional ground was also stated to the learned magistrate and that was that the police was instructed by the Attorney-General to seize all computers and laptop belonging to the applicant.

[3] The learned magistrate acceded to the request and so it was that two search warrants were issued as a result of which the applicant's laptop was seized.

[4] After its seizure, the 1st respondent brought the laptop to the magistrate court for it to be dealt with in accordance with the law as required by s. 56 of the Criminal Procedure Code. Unfortunately, no magistrates were available on that day as all had gone to Kota Kinabalu for an official function. The matter was brought to the attention of one of the registrars of the Subordinate Courts, who, after receiving instruction *via* the telephone from a magistrate, handed over the laptop to the 1st respondent.

The Applicant's Notice Of Motion

[5] By this motion, the applicant sought to set aside the two search warrants made by the learned magistrate on the ground that they were issued contrary to law due to non-compliance with s. 56 of the Criminal Procedure Code.

Section 56

[6] The opening sentence of this section provides that 'if a magistrate, upon information and after such inquiry as he thinks necessary, has reason to believe that anything upon, by or in respect of which an offence has been committed, or any evidence or thing which is necessary to the conduct of an investigation into any offence, may be found in any place, he may issue a search warrant'.

[7] The primary requirement therefore is the information laid before the magistrate and the inquiry he made respecting it 'as he thinks necessary' before issuing the warrant. The applicant's counsel submitted that there was no information before the learned magistrate and from the notes of proceedings, no inquiry was held by him. The learned Senior Federal Counsel replied that there was sufficient information before the magistrate and the absence of an inquiry does not render the search warrants illegal because the law does not provide for the procedure on how it should be done. With respect I agree with only half of that statement. In my view the inquiry in itself is not mandatory under s. 56 because it is to be conducted only if the learned magistrate 'think it necessary'. Clearly there is a discretion vested in him whether to conduct the

A inquiry but it is not because as she said the law does not provide for the procedure. Although there is no prescribed procedure for such an inquiry, nevertheless, just like any other inquiry required by law to be done, a magistrate could proceed to call for further evidence and summon any witness whom he believes would be of
B some assistance to him in deciding whether to issue the warrant or not.

[8] However, in my view, there is no compromise that there must be credible information before a magistrate issues the warrant
C or in the absence of such information, then 'reason to believe' that incriminating evidence connected to an offence is to be found in the place stipulated in the warrant. As to what constitutes 'reason to believe' I agree that the only way to determine it is to look into the circumstances of the case to see if they are such
D that any reasonable man could see sufficient cause to believe (per Arulnandom J in *Ahmad bin Ishak v. PP* [1974] 1 LNS 2 HC. The requirement for 'information' and 'reason to believe' is mandatory because the execution of the warrant will definitely result in the invasion of the privacy and property of the owner of the premises
E so named and may even result in the confiscation of his property. A person's privacy and the right to his property are very basic rights of a man and that to his property is even enshrined under art. 13(1) of the Federal Constitution.

F **[9]** What I want to emphasize is this. The role of a magistrate when faced with an application for search warrants is an onerous one. He has to delicately balance the rights of a person to his privacy and the exclusive enjoyment of his property with the need of the police to gather evidence for the prosecution of offences
G by the state against an individual. In order for that decision to be made justly and given that the person whose rights would be infringed will not be represented at the application for the search warrant, the magistrate concerned must ensure that the information laid before him is one which possessed credibility and
H 'reason to believe' means good and cogent reasons which supports the belief that incriminating evidence of an offence would be found in the premises stated in the warrant.

[10] The next question to be asked is whether there was such an information before the magistrate or reason to believe that
I seditious materials were to be found at the office of the legal firm or the home of the applicant

Information/Reason To Believe

[11] From the notes of proceedings of the learned magistrate, it would appear that, at the hearing of the application for the warrants, he was merely informed:

(i) of a complaint by En. Jublin ak Derai that there was an article posted in the blog of the applicant whom the complainant believed was seditious in nature and was used by the applicant to canvass for votes in the last general election.

(ii) the office of the attorney-general had directed that all computers and laptop of the applicant be seized.

No police report of the complainant was exhibited to the application and neither was the impugned article or the instruction from the Attorney-General's office, if it was written, or if oral, then the relevant entry in the investigation diary of the police officer concerned to show when this instruction was received.

[12] It must be stressed again that what must be laid before the learned magistrate must not be just any information but one credible enough to form a basis for believing that seditious materials were to be found in the two places named in the warrant and in the context of this case, nothing is more urgent than the article itself. Without the article, the learned magistrate would not be in the position to assess for himself whether the said article contained seditious tendencies which points to a criminal offence. Instead what he was told was merely the belief of En. Jublin ak Derai that the article has criminal elements and which caused disharmony amongst those of different races and religions (the Bahasa Malaysia words used were '... artikel tersebut juga berunsur jenayah dan memberikan ketidakselesaan antara kaum dan negara'.

[13] In my view, this snippet of opinion, was clearly not enough to constitute 'information' or 'reason to believe' under s. 56 of the Criminal Procedure Code bearing in mind what I said earlier that a search warrant is a tool which legalize the invasion of a person's privacy, his property and may even lead to the confiscation of his property.

[14] Further, as rightly submitted by the applicant's counsel, the learned magistrate ought to have known, given the wide publicity of the decision of the election judge that the matter complained of by En. Jublin ak Derai as mentioned in the search warrant was

raised in the election petition. In saying so, I am not imposing too high a burden on the learned magistrate or any other magistrate for that matter to know each and every case decided by the courts, in particular the higher courts, but only the cases which has received prominent coverage in the media. Further, the election case was heard in Kuching, the same station the learned magistrate is serving. If there was due diligence on his part or if he had been aware of the election judge's decision on it, there is some degree of probability that he might not have issued the search warrant without asking for further information or making further inquiry from the 1st respondent respecting the article.

[15] In saying this I am aware of the decision in *DP Vijandran v. Karpal Singh & Ors* [2000] 6 CLJ 433 HC where it was held that there was no presumption that a prior judgment is the correct decision on a matter and that there is nothing in the Evidence Act 1950 to warrant the conclusion that the statements or finding of facts in another case can be used as evidence in a subsequent case to decide the points which are in issue in the subsequent case. However, here the situation is different. What the learned magistrate should be concerned with is the credibility of the information before him and the fact that a court, a superior one at that had made findings of fact which showed that no offence of the magnitude of the complainant's belief was committed should be relevant to help him in his decision. In this regard one of the applicant's counsels have submitted that the burden of proof in election cases being beyond reasonable doubt and since the matter of the article has been decided by the election judge and was, therefore, *res judicata*, there was nothing left for the police to investigate as it has been found by the election judge that no offence had been committed by the applicant. With due respect, I am unable to agree with this point of submission as it is totally the prerogative of the attorney-general whether to go ahead with the prosecution of an offence under any law against the applicant despite the findings of the election judge, bearing in mind what was said in *DP Vijandran*'s case *(supra)* as quoted earlier.

[16] Coming back to the search warrants in this case, it was obvious to me upon examination of the notes of proceedings that the mere belief of the complainant cannot constitute 'information' nor 'reason to believe' under s. 56 of the Criminal Procedure Code. They were in my view unlawfully issued and must be set aside.

In Accordance With The Law

[17] Before I conclude, I need to just mention one other issue brought up at the hearing before me. It is that the Registrar of the Subordinate Courts should not have handed over the laptop to the 1st respondent.

[18] Section 56 of the CPC provides that after seizure, the item seized must be brought before the same magistrate or some other magistrate to be dealt with in accordance with the law.

[19] No doubt the 1st respondent had complied with the provision of s. 56 when he brought the laptop back to the court and handed it over to the Registrar of the Subordinate Courts but what the Registrar of the Subordinate Courts did was not, as rightly submitted by the applicant's counsel, dealing with it 'in accordance with the law'. She was merely obeying the instruction of the magistrate who had no physical sight of the laptop seized in order to make up his mind what next to do with it. Though it was most unfortunate that no magistrate was around on that day, in my view, the most logical thing to do would be to keep the laptop in the custody of the Registrar of the Subordinate Courts pending the next working day where not just the learned magistrate but other magistrates would be around to deal with the seized laptop. Clearly the provision of s. 56 has been infringed yet again. This infringement reinforced my earlier decision that the search warrants issued in this case must be set aside. The laptop of the applicant accordingly must be returned to him. At the first hearing of this motion before me I was informed by the 1st respondent personally that the laptop has been surrendered to the forensic department of the Police Headquarters in Kuala Lumpur. I therefore could not order that it be returned forthwith but within three working days from day of delivery of this decision to enable the necessary arrangements to be made respecting its handing over.